

ISSUES

- 1) Claims 19-23, 28 and 31 have been rejected under 35 USC 112, second paragraph for lacking antecedent basis for "said linking moieties."
- 2) Claims 2-7, 18-21, 23-25, 28 and 31 have been rejected under 35 U.S.C. 102(e) as anticipated by Desai et al. (U.S. Patent No. 5,578,442).
- 3) Claims 1, 4, 8, 10-16, 24 and 26 have been rejected under 35 U.S.C. 102(b) as anticipated by Francis et al. (WO 95/06058).
- 4) Claims 1, 4, 8, 14-16, 24 and 26 have been rejected under 35 U.S.C. 102(a) as anticipated by Jeong et al.
- 5) Claims 1-26, 28 and 31 have been rejected under 35 U.S.C. 103(a) as obvious over the combination of Desai et al. in view of Francis et al.

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AMENDMENT
Serial Number: 09/023,765
Filing Date: June 1, 1999
Title: ANTIGENIC MODULATION OF CELLS

Page 14 of 29
Docket No.: 359,006US1

GROUPING OF CLAIMS

The following grouping of claims is made in compliance with the requirements of 37 C.F.R. 1.191 for the content of an Appeal Brief. The following grouping of claims is made to expedite this Appeal and narrow issues, and is not intended to waive or limit the right of the Applicants to enforce and defend claims separately, even though they are grouped for convenience in this Appeal.

With Respect to the Issues Under 35 U.S.C. 112

Each claim stands by itself, each individual claim rejected (or the claim from which it depends) having been amended to remove the error.

With Respect to Issues of Anticipation Under 35 USC 102(b) by Desai et al. (U.S. Patent No. 5,578,442)

Claims 2-7 and 24 shall stand or fall with the patentability of claim 2.

Claims 18, 28 and 31 shall stand or fall with the patentability of claim 18, this claim specifically reciting a linking group not specifically recited in earlier claims.

Claims 19-23 and 25 shall stand or fall together with the patentability of claim 19, based upon the recitation of the attachment of the covalent bond directly to the antigenic determinants.

With Respect to Issues Rejecting Claims 1, 4, 8, 10-16, 24 and 26 under 35 U.S.C. 102(b) As Anticipated by Francis et al. (WO 95/06058)

Claims 1, 8, 15, 24 and 26 shall stand or fall with the patentability of claim 1.

Claim 4 shall stand or fall by itself, this claim reciting the absence of toxic by-products, a limitation not present in other claims.

Claim 10 and 16 shall stand or fall with the patentability of claim 10, reciting a specific blocking group.

AMENDMENT
Serial Number: 09/021,765
Filing Date: June 1, 1999
Title: ANTIGENIC MODULATION OF CELLS

Page 13 of 29
Docket No.: 239,006US1

Claim 11 shall stand or fall by itself, reciting a specific blocking group.

Claim 12 shall stand or fall by itself, reciting a specific blocking group.

Claim 13 shall stand or fall by itself, reciting a specific position of attachment with regard to the cell.

Claim 14 shall stand or fall by itself, reciting a specific linking group.

With Respect to Issues Rejecting Claims 1, 4, 8, 14-16, 24 and 26 Under 35 U.S.C.

102(a) As Anticipated by Jeong et al.

Claims 1, 24 and 26 shall stand or fall with the patentability of claim 1.

Claim 4 shall stand or fall by itself, this claim reciting the absence of toxic by-products, a limitation not present in other claims.

Claim 16 shall stand or fall by itself, reciting a specific blocking group.

Claims 14-15 shall stand or fall with claim 14, reciting a specific linking group.

With Respect to Issues Rejecting Claims 1-26, 28 and 31 Under 35 U.S.C. 103(a) as obvious over the combination of Desai et al. in view of Francis et al.

Claims 1, 3, 8, 15, 17, 24, 25 and 26 shall stand or fall with the patentability of claim 1.

Claims 2 and 9 shall stand or fall with the patentability of claim 2, reciting a specific degree and test for stability.

Claim 4 shall stand or fall by itself, this claim reciting the absence of toxic by-products, a limitation not present in other claims.

Claims 5, 6 and 7 shall stand or fall with the patentability of claim 5, this claim differing from claim 1 in reciting a nuclear cell.

Claim 10 and 16 shall stand or fall with the patentability of claim 10, reciting a specific blocking group.

Claim 11 shall stand or fall by itself, reciting a specific blocking group.

Claim 12 shall stand or fall by itself, reciting a specific blocking group.

AMENDMENT

Serial Number: 09/323,765

Filing Date: June 1, 1999

Title: ANTIGENIC MODULATION OF CELLS

Page 16 of 29

Docket No. 259,006US1

Claim 13 and 19-23 shall stand or fall with the patentability of claim 13, reciting a specific position of attachment with regard to the cell.

Claim 14 shall stand or fall by itself, reciting a specific linking group.

Claim 18 shall stand or fall by itself, reciting a specific position of attachment to the cell surface.

AMENDMENT
Serial Number: 09/323,763
Filing Date: June 1, 1999
Title: ANTIGENIC MODULATION OF CELLS

Page 17 of 29
Docket No.: 259,006UE1

RESPONSE TO THE REJECTIONS

Claims 14, 19-23, 28 and 31 have been rejected under 35 U.S.C. 112, second paragraph because of the ambiguity presented by the terms "anuclear" and "nuclear" in the claims.

Claims 15, 17-23, 28 and 31 were to have been amended to remove this ambiguity in the Amendment filed under 37 CFR 1.116. Those claims where an amendment was needed (e.g., claims 17, 18 and 31). The issue of this rejection is now moot.

The rejection is actually in error on a number of claims. For example, Claim 2 recites a nuclear cell. (See line 1 and subparagraph a). Claim 21 depends from claim 2 and recites a nucleated cell. Claim 28 depends from claim 21 and recites a nucleated cell. Similarly, claims 20-23 recite nucleated cells, which is consistent with claim 2. The rejection is at most applicable to claims 17, 18 and 31. There is no incompatibility between the language of the other claims as asserted by the rejection.

Claims 2-7, 18-21, 23-25, 28 and 31 have been rejected under 35 U.S.C. 102(c) as anticipated by Desai et al. (U.S. Patent No. 5,578,442).

The Claims (represented by Claim 2, which is also highlighted for emphasis, below) specifically recite that the composition includes:

2. A non-aggregating, non-immunogenic nuclear cellular composition in which at least 25% by number of nuclear cells in said composition remain viable for 96 hours consisting of:

AMENDMENT
Serial Number: 09/323,765
Filing Date: June 1, 1999
Title: ANTIGENIC MODULATION OF CELLS

Page 18 of 29
Docket No.: 259,006US1

- a) a mammalian nuclear cell having a cell surface and antigenic determinants on said surface; and
- b) sufficient amount of hydrophilic, biocompatible, non-immunogenicity providing compound or polymer covalently attached to said surface so that recognition of said antigenic determinants on said surface is blocked by said covalently bonded hydrophilic, biocompatible, non-immunogenicity providing compound or polymer. (Emphasis added).

These recitations are absolute and clear limitations on every claim remaining in the application. That specific limitation must be taught by Desai et al. for this rejection to be tenable. Desai et al. do not teach covalent bonding of a non-immunogenic compound on a virus particle surface.

There is no specific disclosure that has been cited in the Office Action which asserts that the linker molecule is covalently bonded to the virus particle. The disclosure of Desai et al. clearly shows both the limitation of "covalent bonding" and bonding to a "virus particle" limitation to be absent from the invention contemplated by Desai et al.

Absence of Covalent Bonding

On column 5, line 38 through column 6, line 60, Desai et al. clearly describe a method and composition which "associates" a polycationic species with the negatively charged cell surface (e.g., column 5, lines 55-60). The language and disclosure in this section clearly denotes and describes an ionic association of the polycationic composition which renders the cells non-immunogenic. Desai et al. repeatedly use language and description consistent with only ionic associations and inconsistent with covalent bonding. Even the reaction mechanisms for removal of the polycation binding to the cells and tissue is clearly incapable of relating to covalent bonding. Note specifically column 5, lines 55-67. The anions used to remove the polycationic materials from the cell surfaces must have high ionic strength. To remove a material from the cell surface

AMENDMENT

Serial Number: 09/323,765

Filing Date: June 1, 1999

Title: ANTIGENIC MODULATION OF CELLS

Page 19 of 29

DocId: No.: 259,006US1

that had been covalently bonded, specific types of chemical activity would have to be described.

The same section also refers to the necessary concentration of anionic species to reverse polycation binding to cells or tissue (column 5, lines 61-67). This language is specifically consistent with the existence of ionic binding and is inconsistent with covalent bonding. The fact that there is never any disclosure of specific reactive groups and reactions between the linker molecule and the cell surface is a further indication of the absence of any teaching or disclosure of covalent bonding to the cell surface by the linker molecule. In the absence of any indication of the necessary groups and reaction conditions for covalent bonding, and the consistent reference to ionic associations and ionic methods of release, it is absolutely clear that Desai et al. do not teach covalent bonding of the linker molecule to the cell surface.

Desai et al. cannot sustain a rejection under 35 U.S.C. 102(e) against the claims. The reference does not teach covalent bonding of the linker molecule to the virus particle surface or even to a cell surface. Although the Office Action repeats its assertion of the inherent formation of covalent bonds with the surfaces of cells or tissues, these assertion do not survive any serious scientific evaluation of the underlying technology.

The evidence to the contrary is that if the listed acids were capable of inherently forming covalent bonds with cells and tissues (in the absence of enzymes or catalysts for that specific reaction), life as we know it would cease on the Earth. If these and the other available alpha-amino acids could covalently bond to cells and tissues without enzymatic activity (which is not present in the *in vitro* environment of Desai), the cells and tissues within the body would bond together. This would mean that blood cells would bond to vascular walls (e.g., cause clots and strokes), would crosslink tissue (e.g., the lungs), and cause other undesirable activities within the human body. These acids are present in foods, supplements and by-products of digestion and would covalently bond to the surface of the stomach, intestines, and other organs.

AMENDMENT

Serial Number: 09/323,765

Filing Date: June 1, 1999

Title: ANTIGENIC MODULATION OF CELLS

Page 20 of 29

Docket No.: 239,006US1

The Examiner has referred to portions of the Desai et al. specification where "free radical polymerization" is referred to, and these discussions have been asserted to reflect covalent bonding to the cell. The referred to section referred to free radical polymerization of components in the composition to each other, and there is no free radical polymerization to a cell, which would kill the cell. This would clearly fail to effect the successful recitation in claim 2 of the level of viability of the cell. This inability of strongly reactive materials to allow viability to continue in cells is supported by the showing on pages 27-32 of the specification, wherein the milder covalent bonding effected by the method of the invention enhanced cell survivability over the more intense bonding of Francis. Desai does not show covalent bonding to the cell, and if the language of the disclosure is misinterpreted to reflect free radical polymerization to the cell, that cell, like the cells of Francis (as shown on pages 27-32 of the specification) would not have a high degree of viability as recited in claim 2. Note the cited sections of the specification that the examiner refers to:

"Optionally, the polycationic species employed in the practice of the present invention can be further modified with one or more functional groups capable of undergoing free radical polymerization. Suitable functional groups for this purpose include unsaturated species capable of free radical polymerization, such as, for example, acrylate groups, vinyl groups, methacrylate groups, and the like. When cells or tissues are treated with such modified polycationic species, the graft copolymer can be further subjected to free radical polymerization conditions, thereby stabilizing the association of graft copolymer with the cell surface. In addition, the further crosslinking of the graft copolymer forms a highly stabilized, immunoprotective coating of water-soluble polymer about the treated cell or tissue.

AMENDMENT
Serial Number: 090323.765
Filing Date: June 1, 1999
Title: ANTIGENIC MODULATION OF CELLS

Page 31 of 29
Docket No.: 259.006US1

The stabilization referred to in this paragraph is not free radical polymerization to the surface, but rather increasing the molecular weight of the species. The paragraph clearly states that the graft copolymer is crosslinked, not that there is any reaction to the cell surface by free radical polymerization. Any attempt to interpret the statement in the manner inherently asserted by the rejection is to extend the teachings of the reference to technology neither taught, implied or inherent. There simply is no showing of covalent bonding to the surface of the cell. The constant and repeated removability of the "polycationic species" clearly establishes that there is no covalent bonding. The rejection is clearly in error and must be withdrawn.

In summary, with regard to all claims (which recite covalent bonding), there appears to be clear evidence that the listed polyamino acids do not spontaneously, within the environment presented by Desai, form covalent bonds with cells and tissues.

Claims 2-7 and 24 shall stand or fall with the patentability of claim 2. As noted above, all of the claims fail to even show covalent bonding. There has been no showing either of the survivability recited in claim 2. That rate cannot be assumed, especially in view of the comparative showing in the specification (e.g., pages 27-32) evidencing the uniqueness and unobviousness of those results.

Claims 18, 28 and 31 shall stand or fall with the patentability of claim 18, this claim specifically reciting a linking group not specifically recited in earlier claims. Desai et al. do not show a linking unit derived from a cyanuric chloride reaction product. This rejection is therefore further not anticipated by the Desai et al. teachings.

Claims 19-23 and 25 shall stand or fall together with the patentability of claim 19, based upon the recitation of the attachment of the covalent bond directly to the antigenic determinants. Even given an erroneous conclusion that Desai et al. teach covalent bonding to the surface of the cell (which it DOES NOT), there is no teaching that Desai et al. show bonding directly to the determinants. These claims are therefore additionally novel over the reference.

AMENDMENT
Serial Number: 09/323,765
Filing Date: June 1, 1999
Title: ANTIGENIC MODULATION OF CELLS

Page 22 of 29
Docket No.: 259,006US1

2. Claims 1, 4-5, 7-8, 10-16, 4 and 26 have been rejected under 35 U.S.C. 102(b) as anticipated by Francis et al. (WO 95/06058).

Claims 1-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Desai et al. in view of Francis et al. (WO 95/06058). This rejection is also respectfully traversed. Although Francis does apparently incidentally show the covalent bonding of a moiety (including PEG, the erythrocytes of Example 7) to the surface of a red blood cell, the bonding is done for the purpose of differentiating cells (so that they may be separated by ionic or electrostatic or other physical process), and only mammalian cells, as opposed to virus particles are bonded with the differentiating compound.

This rejection therefore fails because the combination of references fails to provide any motivation for the covalent bonding of compounds to the surface of nuclear or anuclear cells with the provision of an anti-immunogenic effect. Even with the teaching of Francis that compounds can be covalently bonded to mammalian cells (including red blood cells in Example 7), the specification specifically replicated the process of Francis et al., compared those cells to cells produced according to the present invention, and clearly established that the process of Francis et al. (which was not intended to provide an anti-immunogenic effect) did not produce an anti-immunogenic effect. In this regard, please note Example IX, and especially the conclusion on Page 30, lines 15-29, especially where it is stated in lines 25-29 that:

"As shown, CmPEG readily modifies the RBC [red blood cell] surface and confers immunocamouflage. In contrast, the TmPEG method as taught by Francis fails to significantly modify RBC and does not yield any protection from immune recognition (Figure 1). (emphasis added)

All of the claims, in various language, effectively recited "A non-aggregating, non-immunogenic ... cellular composition..." Francis et al. has been shown to provide a

AMENDMENT
Serial Number: 09/323,763
Filing Date: June 1, 1999
Title: ANTIGENIC MODULATION OF CELLS

Page 23 of 29
Docket No.: 259.006U31

cell composition that is NOT non-immunogenic. Francis et al. has therefore been shown to fail to anticipate the present invention. As direct, detailed, and uncontraverted evidence has been provided that shows that Francis et al. fails to anticipate this critical language of the claims, the rejection is clearly in error and must be withdrawn.

There is no motivation to perform a non-immunizing activity on nuclear or anuclear cells and clear evidence that the process of Francis et al. cannot provide that activity. Without such ability or motivation, there is no underlying basis for the assertion of obviousness.

The point of this argument is that Francis, even if covalent attachment is shown, destroys or greatly reduces the viability of the cells, contrary to the teachings of the present invention. This result is consistent with the purpose of Francis, which does not seek to create viable cells with immunogenic properties, but merely intends to provide a method of separating cells by bonding weighted polymers to them to make them more easily separable. This gross material addition to cells to make them more distinguishable is not material or functionally related to the purpose of creating viable immunogenic cells. Having no intent at cell survival, Francis uses techniques that reduce cell viability to a degree (shown by comparison in the specification examples on page 27-32) that are outside the limits of all claims. The term viable, alone, is sufficient to show lack of anticipation between the teachings of Francis and the claimed invention.

Claims 1, 8, 15, 24 and 26 shall stand or fall with the patentability of claim 1.

The novelty of these claims has been firmly established above.

Claim 4 shall stand or fall by itself, this claim reciting the absence of toxic bye products, a limitation not present in other claims. The novelty of this claim has been established above. Additionally, the examples and accompanying descriptions on pages 27-32 show that Francis produces waste bye-products that damage the cells. The reference therefore clearly fails to anticipate the invention as claimed.

AMENDMENT
Serial Number: 09/323,765
Filing Date: June 1, 1999
Title: ANTIGENIC MODULATION OF CELLS

Page 24 of 29
Docket No.: 259,006US1

Claims 5 and 7 shall stand or fall with the patentability of claim 5, this claim differing from claim 1 in reciting a nuclear cell. The arguments for establishing the novelty of these claims is otherwise identical to those presented with respect to claim 1 above.

Claim 10 and 16 shall stand or fall with the patentability of claim 10, reciting a specific blocking group. Francis does not show a linking unit derived from a cyanuric chloride reaction product. This rejection is therefore further not anticipated by the Francis teachings.

Claim 11 shall stand or fall by itself, reciting a specific blocking group. This specific blocking group has not been asserted to be shown by Francis and is therefore novel.

Claim 12 shall stand or fall by itself, reciting a specific blocking group. This specific blocking group has not been asserted to be shown by Francis and is therefore novel.

Claim 13 shall stand or fall by itself, reciting a specific position of attachment with regard to the cell. Francis has not been found nor asserted to show covalent bonding directly to the determinants on the cell surface. The rejection must additionally fail for that reason.

Claim 14 shall stand or fall by itself, reciting a specific linking group. Francis does not show a linking unit derived from a cyanuric chloride reaction product. This rejection is therefore further not anticipated by the Francis teachings.

3. Claims 1, 4-5, 14-16, 24 and 16 have been rejected under 35 U.S.C. 102(a) as anticipated by Jeong et al.

Applicants have repeatedly provided an official correspondence from Marcel Dekker clearly identifying the publication date of the Jeong et al. article. The evidence clearly

AMENDMENT

Serial Number: 09/323,765

Filing Date: June 1, 1999

Title: ANTIGENIC MODULATION OF CELLS

Page 25 of 29

Docket No.: 259.006US1

shows that the actual publication date of the reference is after the priority date of this application. The rejection therefore fails to meet the statutory requirements as a reference under 35 U.S.C. 102(a). The present application has been provided with a priority date under 35 U.S.C. 120 of June 27, 1996 (from U.S. Patent No. 5,908,624), the Examiner has acknowledged subject matter priority through the obviousness-type double patenting rejection, and the priority date is even before the publication date of Jeong et al., and not merely within on year of the publication date. This rejection is in error as a matter of law.

4. Claims 1-16, 28 and 31 have been rejected under 35 U.S.C. 103(a) as obvious over the combination of Desai et al. in view of Francis et al.

This rejection is clearly in error, at least for the following reason. Desai et al. has been clearly established as failing to show covalent bonding of PEG to cell surfaces. The Francis et al. reference, showing a specific format for providing covalent bonding of PEG to a cell surface for a purpose other than providing non-immunogenicity, fails to provide non-immunogenicity by his sole described method. That fact has been established by direct comparison of the Francis et al. method and a method according to the practice of the invention. Therefore, even if the methods of Desai et al. and Francis et al. were combined, they would not be expected to provide the properties recited in the claims. There is no predictability, motivation or assurance that any combined product or process of Desai in view of Francis could produce a viable cell without consideration of the teachings of the present Application.

The rejection is therefore clearly in error. Not only was the covalent bonding shown by Francis et al. not intended to provide non-immunogenicity, the actual effect of the process failed to provide non-immunogenicity. The combination therefore fails to show that the invention as a whole, including the resulting properties, are obvious. The

AMENDMENT

Serial Number: 09/323,765

Filing Date: June 1, 1999

Title: ANTIGENIC MODULATION OF CELLS

Page 26 of 29
Docket No.: 259.006US1

rejection therefore fails to meet minimum statutory requirements to establish a *prima facie* case of obviousness. The rejection is in error and must be withdrawn.

Additionally, the purpose for the covalent bonding of compounds to mammalian cell shown by Francis is for a fundamentally different purpose than that shown by Desai. Desai requires the preparation of reversible, non-adhesive cells, while Francis is teaching the preparation of adducts of a polymer and a targeted material, which are shown to be differentiable (e.g., in solvents so that they separate). Although Desai does teach that his reversible attachment (ionic attachment) of can reduce aggregation, Francis appears to indicate that aggregation still occurs with both his inventive composition and with control compositions (Examples 3 and 4). There is no nexus between the two references that would allow their combination, even if they are proposed to be combined. In addition, with this fundamental difference in the objective of the two references, they would not be combined to motivate one skilled in the art to modify the surface of a viral particle, a process not taught in either reference.

Claims 1, 3, 8, 15, 17, 24, 25 and 26 shall stand or fall with the patentability of claim 1. The arguments directly above reflect the basic position on this set of claims. Those arguments are also applicable to all other claims in the Application, even where additional novel and unobvious features are shown.

Claims 2 and 9 shall stand or fall with the patentability of claim 2, reciting a specific degree and test for stability. Extensive comparisons were provided in the specification on pages 27-32 which have not been given their technical respect. That evidence is compelling on the fact that the recited covalent bonding and the specific degree of viability (which is recited in these claims) has not been shown to be taught, obvious, enabled or otherwise available from the teachings of these references. These properties are clearly not inherent as the reprise of the Francis process shows a significantly lower viability rate. There is no legal basis for the continued assertion of

AMENDMENT

Serial Number: 09/323,765

Filing Date: June 1, 1999

Title: ANTIGENIC MODULATION OF CELLS

Page 27 of 29

Docket No.: 259.006US1

unobviousness except by ignoring the data and examples or by applying unwarranted pejorative attacks on the examples.

Claim 4 shall stand or fall by itself, this claim reciting the absence of toxic bye-products, a limitation not present in other claims. The novelty of this claim has been established above. Additionally, the examples and accompanying descriptions on pages 27-32 show that Francis produces waste bye-products that damage the cells. The reference therefore clearly fails to anticipate the invention as claimed.

Claims 5, 6 and 7 shall stand or fall with the patentability of claim 5, this claim differing from claim 1 in reciting a nuclear cell. Patentability arguments are otherwise the same as those provided above for Claim 1.

Claim 10 and 16 shall stand or fall with the patentability of claim 10, reciting a specific blocking group. Neither Francis nor Desai et al. show a linking unit derived from a cyanuric chloride reaction product. This rejection is therefore further not anticipated by the Francis teachings.

Claim 11 shall stand or fall by itself, reciting a specific blocking group. Neither Desai et al. nor Francis show this specific blocking group. It has not been asserted to be shown by Francis or Desai and is therefore novel and unobvious.

Claim 12 shall stand or fall by itself, reciting a specific blocking group. Neither Desai et al. nor Francis show this specific blocking group. It has not been asserted to be shown by Francis or Desai and is therefore novel and unobvious.

Claim 13 and 19-23 shall stand or fall with the patentability of claim 13, reciting a specific position of attachment with regard to the cell. Neither Desai et al. nor Francis has been asserted to specifically show attachment at the determinant sites. In the absence of such a teaching in either reference, the rejection must fail.

AMENDMENT

Serial Number: 09/323,765

Filing Date: June 1, 1999

Title: ANTIGENIC MODULATION OF CELLS

Page 28 of 29

Docket No.: 259.006US1

Claim 14 shall stand or fall by itself, reciting a specific linking group. Neither Desai et al. or Francis shows a linking unit derived from a cyanuric chloride reaction product. This rejection is therefore further not anticipated by the Francis teachings.

Claim 18 shall stand or fall by itself, reciting a specific position of attachment to the cell surface. Neither Desai et al. or Francis shows a linking unit derived from a cyanuric chloride reaction product. This rejection is therefore further not anticipated by the Francis teachings.

This rejection is in error and must be withdrawn.

AMENDMENT
Serial Number: 09/323,765
Filing Date: June 1, 1999
Title: ANTIGENIC MODULATION OF CELLS

Page 29 of 29
Docket No.: 259.006US1

CONCLUSION

All rejections of record have been shown in detail to be in error. The rejection should be reversed and all claims should be indicated as allowable.

The Examiner is invited to telephone the below-signed attorney at 952-832-9090 to discuss any questions that may remain with respect to the present application.

Respectfully submitted,
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I hereby certify that this correspondence is being faxed to the US Patent and Trademark Office at 703.872.9306, the number identified on Page 6 of the Office Action, on 2 September 2004.

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